No. 89-7645

In The

Supreme Court of the United States

October Term, 1990

DIONISIO HERNANDEZ,

Petitioner,

vs.

NEW YORK,

Respondent.

On Writ Of Certiorari To The Court Of Appeals Of New York

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 23, 1990
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

THE PEOPLE OF THE STATE OF NEW YORK

-against-

DIONISIO HERNANDEZ,

Defendant.

Indictment Number 7649/85

CRIMINAL TERM: PART 33
Brooklyn, New York
November 3-7, 1986

* * *

[19] MR. BLAUSTEIN: None by the defense.

Will the Court note the fact that I'm raising objection to counsel – to the District Attorney taking Spanish people off the jury. This is already the fourth person of Spanish descent who had a Spanish name that the District Attorney has excluded from the jury, and I think even Elizabeth Holtzman, the District Attorney, several months ago said that she does not favor the practice of [20] her District Attorneys rejecting blacks or Hispanics or minority people, and she made it very plain. It was on page one of the Law Journal, and I'm going to make an objection here at this time.

MR. McINTYRE: Yes, your Honor, may I respond?

MR. BLAUSTEIN: I'm going to make an objection at this time that he has rejected all the Hispanics, Judge. We have no Hispanics on this jury because of the District Attorney's challenges, either peremptory or for cause.

I'm sorry. They were all peremptory. They weren't for cause. He had no real reason to reject any of them.

MR. McINTYRE: Your honor, my reason for rejecting the – these two jurors – I'm not certain as to whether they're Hispanics. I didn't notice how many Hispanics had been called to the panel, but my reason for rejecting these two is I feel very uncertain that they would be able to listen and follow the interpreter.

MR. BLAUSTEIN: You mean the engineer couldn't understand?

MR. McINTYRE: Excuse me. I listened to you, Mr. Blaustein. Can you listen to me?

[21] MR. BLAUSTEIN: Go ahead, I'm sorry.

MR. McINTYRE: We talked to them for a long time; the Court talked to them, I talked to them. I believe that in their heart they will try to follow it, but I felt there was a great deal of uncertainty as to whether they could accept the interpreter as the final arbiter of what was said by each of the witnesses, especially where there were going to be Spanish-speaking witnesses, and I didn't feel, when I asked them whether or not they could accept the interpreter's translation of it, I didn't feel that they could. They each looked away from me and said with some hesitancy that they would try, not that they could, but that they would try to follow the interpreter, and I feel that in a case where the interpreter will be for the main

witnesses, they would have an undue impact upon the jury.

I see also, since Mr. Blaustein has raised the issue, that Mr. Luis Munoz – if that's who he's referring to – was challenged by the People. His brother had been arrested on a violation of probation, and I asked him several questions about that, not specific – not several questions about [22] that, but I did ask him about that, and I didn't feel he could be fair to the People with his brother currently being prosecuted by law enforcement in our office.

I don't know of any other Hispanics.

MR. BLAUSTEIN: Do you still think the jury can be fair when we have mothers who have sons who are police officers? Do you think it's fair to put them on a jury?

You picked out the man quickly enough as Munoz as the other Spanish-speaking man.

MR. McINTYRE: Excuse me.

MR. BLAUSTEIN: You mentioned his name. I couldn't even remember his name, but I remember there was one other Spanish boy that you dumped, and I'm going to at this time asked for a mistrial, Judge, based on the fact – based on the conduct of the District Attorney.

MR. McINTRYE: Your Honor, may I have a moment? I want to call my office.

THE COURT: About?

MR. McINTYRE: I would just like a moment to call my office.

MR. BLAUSTEIN: Can we have a ruling? I'm [23] moving for a mistrial.

MR. McINTYRE: I may want a supervisor over here.

MR. BLAUSTEIN: What is a supervisor going to do with this case?

MR. McINTYRE: Thank you.

THE COURT: Before I make a ruling.

(Pause in the proceedings).

MR. BLAUSTEIN: Let me renew my motion at this time.

THE COURT: Denied.

MR. McINTYRE: Let me respond also.

MR. BLAUSTEIN: I haven't had a chance to mention the names of the parties.

The District Attorney at this time is rejecting –

THE COURT: Two jurors.

MR. BLAUSTEIN: (continuing) – peremptorily Gonzalez, Mico (phonetically), and has rejected heretofore Munoz and Rivera, and I think that shows a pattern here of eliminating Hispanics from the jury, and I therefore move for a mistrial.

MR. McINTYRE: Your Honor, I have to respond just for the record. I do want to say, though, [24] before I respond to each of the individual jurors, that this case, involves four complainants. Each of the complainants is Hispanic. All my witnesses, that is, civilian witnesses, are

going to be Hispanic. I have absolutely no reason – there's no reason for me to want to exclude Hispanics because all the parties involved are Hispanic, and I certainly would have no reason to do that. I'm just trying to find Mr. Rodriguez.

As I said about Mr. Munoz, his brother is being prosecuted by our office. His brother had a violation of probation. I don't think we went into any detail on the underlying crime, but I thought that as I questioned him on that, there might be some prejudice.

As I spoke to these last two, that is, her name is not Mico, I think it was Micous (phonetically) –

MR. BLAUSTEIN: Micous. I'm sorry.

MR. McINTYRE: (continuing) – his name is Gonzalez, and I questioned his at some length, and I felt that from their answers they would be hard pressed to accept what the interpreter said as the final thing on what the record would be, and I even [25] had to ask the Judge to question them on that, and their answers were – I thought they both indicated that they would have trouble, although their final answer was they could do it. I just felt from the hesitancy in their answers and their lack of eye contact that they would not be able to do it.

I'm having trouble finding the notes on Rivera. Do you know what round he was in, Mr. Blaustein?

MR. BLAUSTEIN: It was a she.

THE COURT: She.

THE CLERK: She was sitting in the back row.

MR. BLAUSTEIN: It wasn't a he.

MR. McINTYRE: I believe I even questioned – challenged her for cause, but I do know that her brother was arrested for gun possession, he's doing five years probation at this time.

In addition to that, she was the one who indicated that she would have a time problem if the case extended, and because of the length of the case and number of witnesses I had, I even questioned about whether or not she would feel the need to hurry up the case. I challenged her for cause, and the Judge denied my challenge for cause. You didn't consent to my challenge for cause.

[26] My reason was I felt that time would be a factor in her decision, and I also felt that the fact that her brother was currently on probation might also influence her decision.

Those are my reasons for the jurors that you have mentioned.

MR. BLAUSTEIN: In other words, you're telling the Court now that if we had four blacks on trial here, that you would eliminate all the blacks from the jury just because you're telling me that because there are four Spanish people involved, that's why you're eliminating four Spanish people?

MR. McINTYRE: I don't understand your logic.

THE COURT: I don't follow you at all there.

MR. McINTYRE: I think that the reasons I've given you have nothing to do with their ethnicity.

MR. BLAUSTEiN: It must be because you said we had four Spanish people involved in this situation and therefore you don't want four Spanish people on the jury. Now if that isn't prejudicial, I don't know what it is.

THE COURT: That's not what he said, Mr. Blaustein. I don't know if you don't know what he says or you don't hear what he says.

[27] What he said was why would he throw off Spanish people when all of his witnesses will be Hispanic people.

MR. BLAUSTEIN: Because he's afraid that there'll be sympathy by Hispanic jurors to Spanish defendants. That's as plain as the nose on my face.

THE COURT: Well, your nose is plain, I grant you that.

MR. McINTYRE: All the victims – that has nothing to do with it.

THE COURT: The victims are all Hispanics, he said, and, therefore, they will be testifying for the People, so there could be sympathy for them as well as for the defendant, so he said ot [sic] would not seem logical in this case he would look to throw off Hispanics, because I don't think that his logic is wrong. They might feel sorry for a guy who's had a bullet hole through him, he's Hispanic, so they may relate to him more than they'll relate to the shooter.

MR. BLAUSTEIN: Well, Judge, let me ask you this question. The People have consistently refused, to, in my challenges for cause, to reject [28] people who are relatives – whose close relatives' sons and brothers are police

officers. I mean, where's the logic there? I don't follow him. You mean that if you're Hispanic, you go off the jury, but if your son is a cop, you keep him on because it's very good to keep somebody on a jury whose son is a cop or whose brother is a cop or whose cousin is a cop?

MR. McINTYRE: May I say, Judge, just to respond once again, I don't want to be confused as saying I'm rejecting people who are Hispanic, but in every one of those cases where I didn't consent to your challenge for cause, Mr. Blaustein, those jurors said, when they were questioned by the Judge, that they could be fair.

Now, if you remember, there were a number of jurors who came up and spoke to the Judge, you and me, and who said they had friends who were police officers. It was a gentleman yesterday afternoon who said he had a friend who was a police officer, and he said he couldn't be fair. I consented. I consented to throw him off the jury.

Where a juror has said, however, that they have relatives or friends who are on the police [29] force and they can be fair, I don't think –

MR. BLAUSTEIN: Well, number two and number three, who you wanted to reject today, both said in response to his Honor's questions they could be fair and they could render a fair and impartial verdict.

MR. McINTYRE: Accordingly, I don't feel a challenge for cause lies.

THE COURT: Therefore, he didn't make a challenge for cause based upon that, but he said the reason that he did in fact remove these jurors is because even though they said they could listen to what the interpreter said

and not let their own evaluation of what the witness says be the answer that they would utilize, he says I have grave doubts, and that's why I'm asking –

MR. BLAUSTEIN: Let me point out to the Court at this time that if we are to pick prospective jurors, that we're going to wind up eventually with these two women whose sons are both police officers. They are either going to wind up as jurors or alternates.

What position does that put me in? I only have one peremptory challenge, Judge, and I'm being [30] short-circuited here very quickly and very cutely by the District Attorney. He knows what he's doing. He's got two women sitting in the back, both got police officer sons. You're going to tell me they're not going to be influenced in any manner if a cop gets on the stand and testifies? You have to be very naive if you think they don't discuss matters with their sons and that they are going to be – they're not going to bend backwards if they hear cops testifying. That's the only reason for – I think one of the reasons for getting rid of these two jurors.

We're left here with a very small panel. I'm left with one peremptory. My throat is being cut because eventually there are going to be two woman whose sons are cops. I have no choice. I won't be able to challenge them and dump them. What kind of fair trial is my client going to get?

MR. McINTYRE: So, Mr. Blaustein, you're in effect conceding that you have –

MR. BLAUSTEIN: No. These are the reasons –

MR. McINTYRE: Can I finish?

You're in fact then saying that there are reasons other than ethnicity for my challenging these [31] two jurors?

MR. BLAUSTEIN: I'm saying both ethnicity and the fact that you want to swing over to these other two women whose sons are cops.

MR. McINTYRE: As long as you're conceding –

MR. BLAUSTEIN: We can't possibly get a fair trial if that condition is going to continue here unless we put in 10 new jurors in the box and start with 10 new and pick jurors from there, Judge, and reject the ones we had, which would be the only fair thing to do, because I'm going to get caught here with two women whose sons are cops, they're not going to do me any good anywhere.

THE COURT: Well, Mr. Blaustein, you say that, and I'm satisfied that these jurors could be fair and impartial from what they said.

As a matter of fact, one of these two prospective jurors said her son in now in the 77th, but he wasn't there before, so she recognizes that some policemen do things that are potentially – and they're only accused, of course, of these crimes, so she recognizes that, and both of them said, when I questioned them, do you believe that police officers could do other than tell the truth, and they both [32] said yes.

In fact, they were smiling when I used the example of my son, who is now an attorney, who did not always tell the truth, and probably may even continue that way sometimes, and they both smiled when I said it because they recognized that, and I'm sure that their sons, during their lifetime, have lied to them, but the answer that their

sons will not testify in this case nor will anybody from their precincts since neither one of them are in the precinct involved.

I don't understand the logic of that, because I understand people can be fair, and if they make up their mind to sit on a jury, they understand they must be fair. These ladies said they would be fair, and I questioned them about this situation, but we're not at those jurors yet, we're at the first two, and, therefore, based upon our discussion, I will deny the motion for the withdrawal of a juror based upon the fact that there was an – action by the District Attorney to exclude all Puerto Rican jurors based upon only the question of ethnicity.

MR. BLAUSTEIN: Note my objection. Note my exception rather.

* * *

CHALLENGE SHEET

SUPREME COURT, KINGS COUNTY

Criminal Term, Part 33, 11th Term, 1986

THE PEOPLE, ETC.

vs.

DIONISIO HERNANDEZ

Before Justice GERALD J. BELDOCK

On trial for Att. Murd. 2d (2 cts.), etc.

Indictment filed 12-31-85

M. Bernstein, Clerk

Accepted Juror's Seat	JUROR'S NAME		Ballot No.	PEOPLE Perempt. Chal.	PEOPLE Chal. Sustained	EXCUSED By Court	EXCUSED By Consent	DEFENDANT Perempt. Chal.	DEFENDANT Chal. Sustained
	ROUND I								
	WILLIAM M. SANDERS	24880	8301				X		
	3 ANTHONY CONGUISTA	24417	2139	1					

Accepted Juror's Seat	JUROR'S NAME		Ballot No.	PEOPLE Perempt. Chal.	PEOPLE Chal. Sustained	EXCUSED By Court	EXCUSED By Consent	DEFENDANT Perempt. Chal.	DEFENDANT Chal. Sustained
	11 LUIS MUNOZ	24401	8765	2					
	1 HELEN DONAHUE	24011	5484					1	
	7 HERBERT HILLMAN	24414	6126					2	
	8 ALBERT MOORE	24602	4783					3	
	12 OREL BROWN	24308	1152					4	
	13 BERTH GOVAN	24313	7513	3					
	14 SALVATORE DURANTE	24881	0406					5	
1	2 STEPHEN YEARWOOD	24421	2387						

Accepted Juror's Seat	JUROR'S NAME		Ballot No.	PEOPLE Perempt. Chal.	PEOPLE Chal. Sustained	EXCUSED By Court	EXCUSED By Consent	DEFENDANT Perempt. Chal.	DEFENDANT Chal. Sustained
2	4 DELORIS RHONE	24006	5887						
3	5 PATRICIA LINDSEY	24000	6635						
4	6 ELLEN KARELITZ	24209	0168						
5	9 EARNESTINE ROSS	24403	5306						
6	10 RUBY A. LEWIS	24500	4532						
	ROUND II								
	FRANK J. SMITH	24519	6446				X		
	BETTY DUDAKOFF	24103	5140				X		

Accepted Juror's Seat	JUROR'S NAME		Ballot No.	PEOPLE Perempt. Chal.	PEOPLE Chal. Sustained	EXCUSED By Court	EXCUSED By Consent	DEFENDANT Perempt. Chal.	DEFENDANT Chal. Sustained
	ROBERTA BEKERMANM	24208	5450						
	WINSTON HOWERTON	24319	2566				X		
	1 NORMAN FRANKEL	24104	3736	4					
	2 FLORENCE RUTIGLIANO	24009	9170	5					
	6 ROBERT WILNER	24209	4426	6					
	5 JUDITH EINSTOSS	24002	8177					6	
	4 JEANNE K. HAYHURST	24008	0422					7	
	3 MARGARET MC MANUS	24994	0267					8	

Accepted Juror's Seat	JUROR'S NAME		Ballot No.	PEOPLE Perempt. Chal.	PEOPLE Chal. Sustained	EXCUSED By Court	EXCUSED By Consent	DEFENDANT Perempt. Chal.	DEFENDANT Chal. Sustained
	7 WANDA ESPOSITO	24009	1604	7					
	10 VALENTIN BURSZTYN	24604	3524	8					
	11 TERESA RIVERA	24415	1765	9					
	8 DOLLY MURREL	24881	3653					9	
	12 EVA COVINGTON	24214	3537					10	
	13 LOUISE MARINO	24505	3010		X				
	14 LISA OLIVERI	24011	6076					11	
7	9 SARAH STATON	24001	2216						

Accepted Juror's Seat	JUROR'S NAME		Ballot No.	PEOPLE Perempt. Chal.	PEOPLE Chal. Sustained	EXCUSED By Court	EXCUSED By Consent	DEFENDANT Perempt. Chal.	DEFENDANT Chal. Sustained
	ROUND III								
	6 MARTHA SCIARA	24004	1518						
	HERBERT DAVIS	24012	8963	10					
8	1 MARTHA FREEMAN	24312	7991						
9	3 ELMA COPELAND	24515	3780						
	2 FANNIE BLACKMAN	24405	2615					12	
	5 ELLA. J. DIXON	24517	3149					13	
	7 CATHERINE SWALLOW	24203	0701					14	

Accepted Juror's Seat	JUROR'S NAME		Ballot No.	PEOPLE Perempt. Chal.	PEOPLE Chal. Sustained	EXCUSED By Court	EXCUSED By Consent	DEFENDANT Perempt. Chal.	DEFENDANT Chal. Sustained
	ROUND IV								
	ETHELINE BLACKMAN	24514	4608				X		
	WILLIE GUILLOT	24994	0536				X		
	DOLORES IEN	24519	7386				X		
	OLGA MARTIN	24506	5158				X		
	LILLIAN SINKLER	24009	8685				X		
	ABBY LEVY	24420	3853				X		
	ANTHONY BORDONARDO	24881	474				X		
	ELIZABETH ELLISON	24510	0450				X		

Accepted Juror's Seat	JUROR'S NAME		Ballot No.	PEOPLE Perempt. Chal.	PEOPLE Chal. Sustained	EXCUSED By Court	EXCUSED By Consent	DEFENDANT Perempt. Chal.	DEFENDANT Chal. Sustained
	NATALIE MAIDA	24224	0128				X		
	EVELYN JAFFE	24004	6143				X		
	ANA MARIA LOPEZ	24207	8663				X		
	KEITH ROBERTS	24884	1181				X		
	ELIZABETH BUTLER	24603	2865				X		
	ANNA MONTONARO	24004	4673				X		
	LLOYD WILDER	24518	5112			X			
	TIMOTHY LIGHTS	24514	4224						

Accepted Juror's Seat	JUROR'S NAME		Ballot No.	PEOPLE Perempt. Chal.	PEOPLE Chal. Sustained	EXCUSED By Court	EXCUSED By Consent	DEFENDANT Perempt. Chal.	DEFENDANT Chal. Sustained
	ROSLYN SIMON	24319	9244						
	JULIUS FRANCUCCI	24002	2568						
	JERRY RAVSKI	24305	4896						
	SANFORD GOLDSTEIN	24418	5368						
	SUSAN TULL	24507	2149	13					
	2 ISMAEL GONZALEZ	24509	9947	11					
	3 LYDIA MIKUS	24507	3673	12					
	6 MULYN FARNWEATHER	24506	5930	14					

Accepted Juror's Seat	JUROR'S NAME		Ballot No.	PEOPLE Perempt. Chal.	PEOPLE Chal. Sustained	EXCUSED By Court	EXCUSED By Consent	DEFENDANT Perempt. Chal.	DEFENDANT Chal. Sustained
	10 MARCELLA HUWER	24009	0038				15		
	11 RODNEY NEBLETT	24010	0367	15					
10	7 MARILYN DANITI	24311	6378						
11	9 ELIZABETH KOKLAS	24002	7926						
12	12 MARIE ADAMO	24510	1325						
	ROUND V								
	IDA BAKER	24012	5389				X		
	WILFRED W. TORRES	24413	7757				X		

Accepted Juror's Seat	JUROR'S NAME		Ballot No.	PEOPLE Perempt. Chal.	PEOPLE Chal. Sustained	EXCUSED By Court	EXCUSED By Consent	DEFENDANT Perempt. Chal.	DEFENDANT Chal. Sustained
ALT1	1 ALICE LUNDRIGAN	24007	9297						
ALT2	2 CONCETTA PULCRANO	24110	1606						
ALT3	3 LIBERINA AMBROSINO	24521	1080						
ALT4	4 HELGA HOLLAND	24524	4383						

Supreme Court, Appellate Division,
Second Department.

The PEOPLE, etc., Respondent,

v.

Dionisio HERNANDEZ, Appellant.

May 16, 1988.

Before THOMPSON, J.P., and LAWRENCE, EIBER and BALLETTA, JJ.

MEMORANDUM BY THE COURT.

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Beldock, J.), rendered January 30, 1987, convicting him of attempted murder in the second degree (two counts), criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

The defendant, who is Hispanic, claims that the prosecutor used his peremptory challenges to exclude from the jury all panel members with Hispanic surnames, thereby violating the defendant's equal protection rights (*see, Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69; *People v. Scott*, 70 N.Y.2d 420, 522 N.Y.S. 2d 94, 516 N.E.2d 1208). Although the ethnicity of one challenged juror is not certain, the record reveals that the prosecutor did in fact peremptorily challenge the only three prospective jurors who definitely had Hispanic surnames. Therefore the defendant has made out a prima facie case of discrimination (*see, Batson v. Kentucky, supra,*

476 U.S. at 96; 106 S.Ct. at 1722; *People v. Scott, supra,* 70 N.Y.2d at 423, 522 N.Y.S.2d 94, 516 N.E.2d 1208). However, as to all the challenged jurors the prosecutor came forward with race neutral explanations for his challenges sufficient to rebut the defendant's prima facie showing (*see, Batson v. Kentucky, supra,* 476 U.S. at 96-97, 106 S.Ct. at 1722-23). Two of the jurors were dismissed because they had close relatives who had been prosecuted by the district attorney's office and there was a question as to their impartiality. The remaining two jurors, including the one whose Hispanic origin was questionable, were challenged because they both spoke Spanish and indicated during the voir dire that they might have difficulty accepting as final and authoritative the court interpreter's translation of the testimony. Although these explanations may not have risen to the level of those needed to justify a challenge for cause, they were sufficient to satisfy the prosecutor's burden to come forward with nondiscriminatory reasons for his challenges (*see, Batson v. Kentucky, supra,* at 97, 106 S.Ct. at 1723; *People v. Baysden,* 128 A.D.2d 795, 513 N.Y.S.2d 495; *lv. denied* 70 N.Y.2d 798, 522 N.Y.S.2d 115, 516 N.E.2d 1228; *People v. Cartagena,* 128 A.D.2d 797, 513 N.Y.S.2d 497; *lv. denied* 70 N.Y.2d 798, 522 N.Y.S.2d 116, 516 N.E.2d 1229).

Court of Appeals of New York.

The PEOPLE of the State of New York, Respondent,

v.

Dionisio HERNANDEZ, Appellant.

OPINION OF THE COURT

BELLACOSA, Judge.

Defendant's essential argument attacks the judgment of conviction as having been secured in violation of his equal protection rights because, as he asserts, the prosecution discriminatorily exercised its peremptory challenges to exclude two Latino persons from the jury that ultimately found him guilty of two counts each of attempted murder and criminal possession of a weapon (*see, Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69). Defendant, also a Latino, satisfied the *Batson*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69, *supra*), threshold predicate of discriminatory use of peremptory challenges by the prosecutor's rejection of all the Latino prospective jurors.

The dispositive issue – circumscribed in this case by pertinent undisturbed factual findings – is whether the prosecution can be said to have failed to satisfy its burden, in turn, to come forward with a neutral explanation for its eschewal of those prospective jurors so as to refute the inference of purposeful discrimination. The two prospective jurors at issue, who were fluent in Spanish, indicated, according to the prosecutor's articulated belief, that they would only try to respect as authoritative the official court interpreter's translation of evidence given

by Spanish-speaking witnesses. This prosecutorial assertion, sufficiently documented by the record and supported in the findings of the two lower courts, warrants our concluding that the prosecutor fulfilled his burden of coming forward with a satisfactory explanation that the peremptory strikes in this case were neutral and nondiscriminatory. We thus affirm the order of the Appellate Division, 140 A.D.2d 543, 528 N.Y.S.2d 625, which had affirmed the conviction.

The conviction, after a jury trial, arose out of a shooting in which defendant had attempted to kill his young woman friend and her mother as they left a restaurant in Brooklyn. During the incident, random shots from defendant's gun struck and wounded two other patrons of the restaurant.

Prior to trial and after the voir dire examination of 63 jurors had been completed and nine jurors had been selected, defense counsel objected to the prosecutor's use of peremptory challenges excusing four potential jurors with Latino surnames. Over the course of an extensive record colloquy, defense counsel objected repeatedly that the prosecutor had removed every Latino from the venire and moved for a mistrial.

The Assistant District Attorney responded that he had challenged two of the jurors, Munoz and Rivera, because each had a brother who had been prosecuted by the same District Attorney's office and that in his opinion these jurors could not be fair in their deliberations on the case. The prosecutor further explained that he had challenged the other two jurors, Mikus and Gonzalez – the only jurors pertinent to the disposition of the issue before

us – because each had given him a basis to believe from words and actions that their Spanish language fluency might create difficulties in their accepting the official court interpreter's translation of the testimony of the Spanish-speaking witnesses. Among selected expressions made during the colloquy, the prosecutor proffered this summary for the record: "ASSISTANT DISTRICT ATTORNEY: Your Honor, my reason for rejecting the – these two jurors – I'm not certain as to whether they're Hispanics. I didn't notice how many Hispanics had been called to the panel, but my reason for rejecting these two is *I feel very uncertain that they would be able to listen and follow the interpreter. * * * We talked to them for a long time; the Court talked to them, I talked to them.* I believe that in their heart they will try to follow it, but I felt there was a great deal of uncertainty as to whether they could accept the interpreter as the final arbiter of what was said by each of the witnesses, especially where there were going to be Spanish-speaking witnesses, and I didn't feel, when I asked them whether or not they could accept the interpreter's translation of it, I didn't feel that they could. *They each looked away from me and said with some hesitancy that they would try, not that they could, but that they would try to follow the interpreter, and I feel that in a case where the interpreter will be for the main witnesses, they would have an undue impact on the jury.*" (Appellant's appendix, at A-23–A-24 [emphasis added]; *see also*, appellant's appendix, at A-26–A-28, A-29). The trial court then denied defendant's mistrial motion, stating: "THE COURT: Therefore, he [Assistant District Attorney] didn't make a challenge for cause based upon that, but he said the reason that he did in fact remove these jurors is because even though they

said they could listen to what the interpreter said and not let their own evaluation of what the witness says be the answer that they would utilize, he said *I have grave doubts, and that's why I'm asking*". (Appendix, at A-32 [emphasis added].) The case was tried with no Latinos on the jury and defendant was convicted. The Appellate Division affirmed the judgment of conviction and a Judge of this court granted leave to appeal.

New York's Criminal Procedure Law provides a method for both the prosecution and defense counsel to challenge for cause the selection of a potential juror if it can be shown that bias may prevent that juror from deciding the case impartially (CPL 270.20). Additionally, a limited number of peremptory challenges – because counsel may intuit a bias that is not documentarily demonstrable sufficient for a challenge for cause – are allowed to exclude jurors usually without any explanation (CPL 270.25).

The 1986 rule in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69, *supra*, added restrictions to the exercise by prosecutors of their peremptory challenges against members of a defendant's racial class. It abandoned the prosecutorially weighted evidentiary tilt of *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 and imposed a new and important calculus. To succeed initially in erecting the presumption of purposeful discrimination, the defendant must demonstrate (1) membership in a "cognizable racial group"; (2) the exercise of peremptory challenges by the prosecutor to exclude members of the defendant's group; and (3) "facts and any other relevant circumstances rais[ing] an inference" of a

discriminatory purpose (*Batson v. Kentucky*, supra, 476 U.S. at 96, 106 S.Ct. at 1722).

At that point the burden shifts to the prosecution to come forward and overcome the attribution and inference of purposeful discrimination with an articulable neutral explanation for having excused those jurors. The prosecutor's explanation need not rise to the level for sustaining a challenge for cause. On the other hand, the prosecutor cannot simply state that rejecting the jurors rested on the assumption they might be favorably disposed to the defendant because of shared race or ethnic similarities. While the prosecutor has this burden of coming forward, "the ultimate burden of persuasion" must be carried by the person alleging the intentional discrimination (*Batson v. Kentucky, supra*, at 94, n. 18, 106 S.Ct. at 1722, n. 18). By these respective weights, *Batson* calibrates the test and burdens while supplying a potent and appropriate remedy against invidious petit jury discrimination.

In *People v. Scott*, 70 N.Y.2d 420, 522 N.Y.S.2d 94, 516 N.E.2d 1208, we applied the *Batson* rule retroactively under *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649. Defendant, a black woman, was charged with murdering and robbing a white man. There were five black prospective jurors in the venire and the prosecutor excused them all peremptorily. We held that the prosecutor's " 'pattern' of strikes" gave rise to an inference of discrimination satisfying defendant's lighter burden (*People v. Scott, supra*, 70 N.Y.2d at 425-426, 522 N.Y.S.2d 94, 516 N.E.2d 1208). We reversed without having to address in that case the issue of what constitutes a neutral explanation under *Batson*.

Here, no one challenges the triggering of *Batson's* threshold. The exercise of prosecutorial peremptory challenges to exclude the only Latino jurors in the prosecution of a Latino defendant is enough (*Batson v. Kentucky*, 476 U.S., *supra*, at 96-97, 106 S.Ct., at 1722-1723; *People v. Scott*, 70 N.Y.2d 420, 522 N.Y.S.2d 94, 516 N.E.2d 1208, *supra*). The only new issue, circumscribed here by pertinent undisturbed factual findings, is whether the prosecution responded with a satisfactory nondiscriminatory explanation for excluding the only Latino jurors. Defendant contends as a matter of law that the burden has not been met because the Latino origins and the Spanish language are so inextricably intertwined that an exclusion of Latinos on the basis of language is inescapably, almost irrefutably, an exclusion on forbidden ethnic or racial grounds.

These jurors, however, were challenged because they indicated their knowledge of the Spanish language might interfere with their sworn responsibility as jurors to accept the official translation of the Spanish-proffered testimony. So it cannot be, as defendant has posed it and as the dissenting opinion would conclude, that the isolated language-ethnic identity factor alone determines this case.

Rather, the prosecutor's belief was that the two Spanish-speaking jurors might be unable or unwilling to accept the evidence properly submitted to them by the court. That is a legitimate neutral ground for exercising a peremptory challenge, and it was for the trial court to determine if the prosecutor's explanation was pretextual or real and justified by the answers and conduct of the two jurors during voir dire. Indeed, the Supreme Court

itself recognized that resolution of these issues springing from the *Batson* test were rightly reposed in fact-finding courts entitled to "great deference" with customary appellate oversight (*Batson v. Kentucky*, 476 U.S., *supra*, at 97-98, n. 21, 106 S.Ct., at 1723-1724, n. 21). That reasonable minds could disagree at this level of review on this record demonstrates the wisdom and propriety of the Supreme Court's and our view that, in the distribution of judicial functions among courts, deference generally to the fact-finding and evidence-viewing court is warranted in these circumstances. The trial court accepted the prosecutor's explanation, as did the Appellate Division, and we have no basis in law or policy to conclude that those courts erred in these essentially factual determinations.

Indeed, the prosecution documented its belief on the jurors' statements and on doubt-raising body language descriptions (e.g., averted eyes and gazes on being questioned on the critical points) developed during an extensive voir dire and placed on the record before the Trial Justice, who was also present at the entire voir dire. The record-based beliefs, advanced to satisfy its *Batson*-based burden, do not appear to us as a matter of law and did not appear to the lower courts as a matter of fact to be some facial facade. If the court was not satisfied with the adequacy of this explanation after watching and listening to the proceedings, of course it could have conducted a further voir dire; but under the circumstances presented here, that was a matter within the trial court's discretion.

The burden, moreover, does not require the prosecution, as the dissenting opinion would, to come forward with reasons rising, in effect and function, to a sustainable challenge for cause, for that would extend *Batson*

and *Scott*, not apply them. Justice Powell's opinion for the Supreme Court in *Batson* is the primary source of guidance and development, and it is carefully modulated to require that the prosecution must show only a neutral record-based belief for exercising a now properly circumscribed statutory right of peremptory excusal of jurors. To bear a proper and balanced burden of coming forward with a neutral explanation of a peremptory excusal of a juror is one thing; to create a new, higher burden of disproving, under "enhanced scrutiny" and the "inherently suspect" classification, a subjective, even "unconscious," state of mind is quite something else. This would be practically and legally speaking an impossible and ultimate burden of proof, not the lesser burden of coming forward with a justifiable explanation. Indeed, this rule would not just circumscribe the exercise of a peremptory challenge by the People; it would change its very nature because the People would have to prove cause for removal as to the juror and absolute purity as to themselves.

In sum, we view quite straightforwardly the essence of this case as being really about a prosecutor's court-accepted explanation concerning the ability of these jurors – or any sworn jurors no matter their race or ethnic similarities – to decide a case on the official evidence before them, not on their own personal expertise or language proficiency (*compare, People v. Legister*, 75 N.Y.2d 832). Hesitancy or uncertainty about being able to decide the case on the same evidence which binds every member of a jury is a proper, neutral and nondiscriminatory basis for the prosecutorial exercise of peremptory challenges. The findings here of a legitimately articulated reason

rooted in principles of jury selection, responsibility and function are valid and supportable in this record.

It is important to emphasize, however, that pretextual maneuvering or less verifiable manifestations of jurors' attitudes about adhering to governing instructions will not satisfy the prosecution's burden. Thus, our holding in no way diminishes the apodictic policy and precedents at issue, which we unequivocally reaffirm.

Our analysis of the record and issues of this case on the merits would produce the same result under the Federal and State equal protection right, as no justification for breaking new ground as to this clause by differentiating between this dually protected constitutional right is sufficiently advanced (*see, Under 21 v. City of New York*, 65 N.Y.2d 344, 360, 492 N.Y.S.2d 522, 482 N.E.2d 1; *Matter of Esler v. Walters*, 56 N.Y.2d 306, 313-314, 452 N.Y.S.2d 333, 437 N.E.2d 1090).

Defendant's remaining contentions of evidentiary trial errors involving impeachment, bolstering and cross-examination are unavailing, because in the circumstances of this case these matters were within the range of the trial court's discretion.

There being no equal protection violation or any other error warranting disturbing the actions of the courts below, the order of the Appellate Division should be affirmed.

TITONE, Judge (concurring).

I am in complete agreement with and wholeheartedly join in the majority opinion by Judge Bellacosa. In addition, the posture in which the *Batson* question is presented here prompts me to set forth my own, strongly held beliefs on the subject of post-*Batson* peremptory challenges.

In his concurrence in *Batson v. Kentucky*, 476 U.S. 79, 102-108, 106 S.Ct. 1712, 1726-1729, Justice Marshall made the observation that the potential for racial discrimination is inherent in the very notion of a system of juror challenges that need not be explained. He further noted that a prosecutor's seemingly neutral verbiage explaining his use of peremptories can easily mask an underlying racist animus, whether conscious or unconscious, adding another layer of complexity to the trial court's task of assessing the propriety of the proffered explanation.

Justice Marshall's comments highlight for me the very profound difficulties involved in reconciling a juror challenge system that is theoretically based on the attorney's inexplicable personal hunch with a constitutional rule that requires attorneys to offer satisfactory "neutral" explanations for their choices. The mandated inquiry, as it is conceived in both the majority and the dissenting opinions, entails an analysis that looks beyond the prosecutor's stated explanation in certain instances, and considers the prosecutor's subjective motivations and state of mind. The inquiry thus renders what was originally to be a matter of unexplained choice into an exploration that is in some respects more complex, and certainly more intrusive, than the objective inquiry involved in resolving juror challenges for cause. Moreover, because, as the dissenter notes, racist motives are

easily concealed, there is no assurance that even an in-depth inquiry will be effective in eradicating racial bias in the jury selection process.

The Supreme Court's decision in *Batson* was a welcome, necessary and important judicial statement that racial bias and racist motivations have no place in our American courtrooms. In the final analysis, however, the most significant development to come out of *Batson* may well lie in Justice Marshall's observation that "only by banning peremptories entirely can such discrimination be ended." (476 U.S., at 108, 106 S.Ct., at 1729.) Even *Batson*, as Justice Marshall noted, permits a degree of discrimination by establishing a threshold test for a prima facie case that tolerates some number of unexplained ethnically targeted challenges (476 U.S., at 105, 106 S.Ct., at 1727 ["(p)rosecutors are left free to discriminate * * * provided that they hold that discrimination to an 'acceptable level' "]). Manifestly, an institution that furnishes the opportunity for racial discrimination, at any level, is – and will continue to be – highly problematic in a society that has grown increasingly intolerant of judgments made on the basis of stereotyping in any form.

At this point in the evolution of this legal issue, I suspect that rather than developing a complex set of judicially imposed limitations and standards, the most constructive course would be for the Legislature to take a hard look at the existing peremptory system with a view toward determining whether it is still viable, at least as it is presently constituted.* Whether or not Justice Marshall

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* It may well be that a system with a drastically reduced number of peremptories for each side would adequately serve

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was correct in his assumption that the historic institution of peremptory challenges simply cannot be purged of its potential for discriminatory practices, it has become increasingly clear that judicial efforts to accomplish that goal can lead only to new layers of inquiry and complex tests that are fundamentally incompatible with the institution's basic premise (*see, People v. McCray*, 57 N.Y.2d 542, 545-549, 457 N.Y.S.2d 441, 443 N.E.2d 915). While such efforts can and must continue to be made, it seems to me that the time is fast approaching for the Legislature to rethink its policy choices in this highly sensitive area of law.

KAYE, Judge (dissenting).

The special importance of this appeal is that it calls upon us, for the first time, to spell out the People's burden once a defendant has established a prima facie case of discrimination in the exercise of peremptory challenges. The United States Supreme Court has not yet been required to do that; nor has our only other opinion on point – *People v. Scott*, 70 N.Y.2d 420, 522 N.Y. S.2d 94, 516 N.E.2d 1208. By this case we thus set a course for the future in this State, marking out the tolerable limits for the People's exercise of peremptory challenges.

The course we now set, I believe, diminishes the declared principle that peremptory challenges cannot be

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the essential purpose of permitting some unexplained juror challenges (*see, People v. McCray*, 57 N.Y.2d 542, 547-549, 457 N.Y.S.2d 441, 443 N.E.2d 915), while at the same time minimizing the opportunity for and incentives to engage in purposeful discrimination.

used to discriminate against racial or ethnic groups. As Justice Marshall cautioned in *Batson v. Kentucky*, "[a]ny prosecutor can easily assert facially neutral reasons for striking a juror". (476 U.S. 79, 106, 106 S.Ct. 1712, 1728.) If that is all that is required, the majority's decision proves his point that there is indeed little real protection in defendant's newly recognized equal protection rights. I therefore respectfully dissent.

Preliminarily, this case should be decided as a matter of State law, rather than Federal law (majority opn, at 358, at 88 of 553 N.Y.S.2d, at 624 of 552 N.E.2d).

Issues involving the proper exercise of peremptory challenges are especially suited to resolution as a matter of State law at this time. As Justice White made clear in his *Batson* concurrence, "[m]uch litigation will be required to spell out the contours of the Court's equal protection holding today, and the significant effect it will have on the conduct of criminal trials cannot be gainsaid." (476 U.S., at 102, 106 S.Ct., at 1726.) In a matter of such day-to-day vital importance locally, the citizens of this State would be well served by the development of an authoritative body of State law instead of being held in suspense, case-by-case, over the next decade of litigation while the United States Supreme Court fleshes out the newly recognized minimum equal protection right that will prevail across the Nation. Several other State courts do exactly this. Indeed, the independent development of State law concerning peremptory challenges has proved particularly beneficial nationally as well as locally. It was, after all, State courts independently construing their State Constitutions that ultimately led the Supreme Court in *Batson* to abandon *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct.

824, and follow "the lead of number of state courts construing their State's Constitution." (*See, Batson v. Kentucky*. 476 U.S., *supra*, at 82, n. 1, 106 S.Ct., at 1715, n. 1.)

Moreover, it cannot be assumed that State law would proceed in lockstep with Federal law as the Federal law on this issue emerges. While this court in *People v. McCray*, 57 N.Y.2d 542, 457 N.Y.S.2d 441, 443 N.E.2d 915, *cert. denied* 461 U.S. 961, 103 S.Ct. 2438, 77 L.Ed.2d 1322, declined to read the State equal protection right differently from then-existing Federal law, *Batson* has effected a very significant change in Federal law that might well alter that conclusion. Just such a shift occurred only recently with respect to the exclusionary rule (*see, People v. P.J. Video*, 68 N.Y.2d 296, 508 N.Y.S.2d 907, 501 N.E.2d 556, *cert. denied* 479 U.S. 1091, 107 S.Ct. 1301, 94 L.Ed.2d 156; *see also, People v. Johnson*, 66 N.Y.2d 398, 411, 497 N.Y.S.2d 618, 488 N.E.2d 439 [Titone, J., concurring]).

Thus, I would decide this case as a matter of State law, agreeing with the observation of the New Jersey Supreme Court that the fact "[t]hat the United States Supreme Court has overruled *Swain* in *Batson* does not mean that the laboratories operated by leading state courts should now close up shop." (*State v. Gilmore*, 103 N.J. 508, 522, 511 A.2d 1150, 1157.)

Reaching the merits, if our review of the prosecutor's conduct is to become merely a matter of identifying undisturbed findings of fact with some support in the record, or deferring to the trial court and Appellate Division or to the prosecutor's assertion of some ostensibly neutral ground, then the role of this court in defining and protecting defendant's nascent constitutional right has

been virtually surrendered at the outset. While the Trial Judge's observations of the unfolding events are of course important, there is still a significant role for this court in clearly articulating the standard and then determining the law question whether the People have satisfied that standard. That has not been done.

This case differs from other "*Batson*" cases in a critical respect that is not, sufficiently credited by the majority. Here, the prosecutor's "neutral" explanation is one that necessarily produces disparate impact on a single ethnic group. The statistics before us indicate that, in Kings County, virtually all Latinos speak Spanish at home. That this case additionally involves testimony of witnesses in Spanish and an official translator hardly minimizes the potential for disparate impact: we are advised that the State court system employs 113 Spanish translators – presumably rendering accurate translations in court proceedings – who are engaged more than 250 times a day. Accepting as a sufficient explanation that the prosecution will offer the testimony of a witness whose native tongue is Spanish – whether or not an interpreter is required – too easily circumvents the People's obligation and the defendant's right, and allows the prosecutor to do by indirection what can no longer be done directly.

An explanation by a prosecutor that may appear facially neutral but nonetheless has a disparate impact on members of defendant's racial or ethnic group is "inherently suspect." (Serr & Maney, *Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of A Delicate Balance*, 79 J.Crim.L. & Criminology 1, 54 [1988].)

Consequently, a reason that is grounded largely in speculation rather than facts uncovered in a voir dire examination, as revealed by the record, should not be accepted (*see, State v. Slappy*, 522 So.2d 18 [Fla]; *Gamble v. State*, 257 Ga. 325, 357 S.E.2d 792; *State v. Gilmore, supra; see also*, 2 LaFave & Israel, Criminal Procedure § 21.3 [1989 Pocket Part]). To conclude otherwise can too easily permit discriminatory practices to continue. " '[I]t is even possible that an attorney may lie to himself in an effort to convince himself that his motives are legal.' * * * A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective [Latino] juror is 'sullen,' or 'distant,' a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported. * * * [P]rosecutor's peremptories are based on their 'seat-of-the-pants instincts' * * * Yet 'seat-of-the-pants instincts' may often be just another term for racial prejudice." (*Batson v. Kentucky*, 476 U.S., *supra*, at 106 S.Ct., at 1728 [Marshall, J., concurring].)

Here, there is not a sufficient evidentiary record to support the prosecutor's explanation. Two persons believed to be of "Spanish descent" were excluded because their Spanish language fluency "might interfere with their sworn responsibility as jurors to accept the official translation of the Spanish-proffered testimony." (Majority opn., at 356, at 87 of 553 N.Y.S.2d, at 623 of 552 N.E.2d.) The majority skews the issue when it states that this case is really about these jurors' ability "to decide [the] case on the official evidence before them, not on their own personal expertise or language proficiency"

(majority opn., at 357, at 88 of 553 N.Y.S.2d, at 624 of 552 N.E.2d); if that were so they undoubtedly would have been excused for cause. Despite this court's repeated reference to the two jurors' initial expressed uncertainty or hesitancy, the fact remains that both individuals satisfied the court that they would accept the official court translation, and that they would be fair and impartial jurors. As the Trial Judge stated on the record, and two jurors "said they could listen to what the interpreter said and not let their own evaluation of what the witness says be the answer that they would utilize." Similarly, the prosecutor acknowledged that the jurors' "final answer was they could do it" (i.e., accept the official court translation as final).

While the People emphasize their interest in excluding Spanish-speaking jurors because of the presence of an interpreter, there is no indication that any other members of the panel were also asked if they spoke Spanish. Charged by defense counsel with discriminating against the two, it is significant that in offering his explanation to the trial court the prosecutor made no indication of similar interest about the balance of the panel (*cf., State v. Antwine*, 743 S.W.2d 51 [Mo], *cert. denied* 486 U.S. 1017, 108 S.Ct. 1755, 100 L.Ed.2d 217 [reasons given – inattentiveness during voir dire and relative in prison – were also reasons used to challenge whites]; *State v. Walton*, 227 Neb. 559, 418 N.W.2d 589 [reason given – no ties to community – also used to challenge whites]; *see also*, 2 LaFave & Israel, *op. cit.*).

Thus, given the potential for disparate impact and the meager record made by the People on the issue, I

cannot agree with the majority that the People have satisfied their burden of rebutting the prima facie case of discrimination in this case.

Where, as here, a language-based reason for exercising peremptory challenges is intimately linked to ethnicity and has the same impact as one that is, in fact, ethnically based, the People's offer of a neutral explanation must be subjected to enhanced scrutiny. The objective of such scrutiny is not to equate peremptories with challenges for cause but to determine whether the proffered ground is indeed an appropriate reason to exclude such groups from the jury at all. Additional voir dire, either directed or conducted by the court, may not always be necessary, but some investigation or inquiry beyond the minimum mandated in the ordinary case is. Otherwise, absent that somewhat more demanding standard, the prosecution's removal of all persons of a certain ethnic group, whether intentionally or not, can all too readily be justified by the mere recitation of a language-based reason. In this State, with its varied and often concentrated ethnic populations, the inevitable effect on the composition of our juries of permitting such language-based justifications without close inspection would be intolerable.

In any event, certainly something more is required than the prosecutor's reference to a subjective impression (based on lack of eye contact) of the sincerity of the jurors' assurances that they would accept the interpreter's version of what the witnesses said. All that we know for certain in this case is that defendant is a Latino, and every Latino has been excluded from a panel of 63

individuals. That being so, the inference remains unrebutted that the trial prosecutor struck the last two Latino jurors on the basis of an intuitive judgment deriving from their heritage. The Supreme Court in *Batson* concluded that the prosecutor "may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption – or his intuitive judgment – that they would be partial to the defendant because of their shared race." (476 U.S., at 97, 106 S.Ct. at 1723.) On this record, we really have no more than that.

Finally, I must question the majority's facile assumption that the explanation offered by the prosecutor was a valid trial-related concern at all. If the interpreters employed by our criminal courts are as accurate as they should be, given that the defendant's liberty may depend upon the translator's words, then there should be no disagreement between the translator and jurors fluent in Spanish. Surely, the majority does not intend to suggest, on the other hand, that if the translator is rendering a witness' testimony inaccurately into English, the State has a valid interest in permitting the errors to go unnoticed. And if the prosecutor's concern is merely that the jurors may become involved in disputes about nuance and word choice, that could be adequately addressed by an instruction that Spanish-speaking jurors are to adhere to the official translation only, and bring any errors they may discern to the attention of the court, but under no circumstances to the attention of their fellow jurors. What is not a permissible method of addressing the situation is the wholesale exclusion from the jury of anyone sharing defendant's racial or ethnic background.

On this record, the removal of the last two Latino jurors for what in the end is simply their proficiency in the Spanish language, should not be sanctioned. I would reverse the Appellate Division order and order a new trial.

WACHTLER, C.J., and SIMONS and TITONE, JJ., concur with BELLACOSA, J.

TITONE, J., concurs in a separate opinion.

KAYE, J., dissents and votes to reverse in another opinion in which HANCOCK, J., concurs.

ALEXANDER, J., taking no part.

Order affirmed.

SUPREME COURT OF THE UNITED STATES

No. 89-7645

Dionisio Hernandez,

Petitioner

v.

New York

ON PETITION FOR WRIT OF CERTIORARI to the Court of Appeals of New York.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to the following questions:

1. Whether a prosecutor's proffered explanation that prospective Latino jurors were struck from the venire because he suspected they might not abide by official translations of Spanish language testimony constitutes an acceptable "race neutral" explanation under *Batson v. Kentucky*, 476 U.S. 79 (1986)?

2. Where a trial court has accepted the prosecutor's proffered explanation as being race neutral, what standard of review is to be applied by reviewing Courts?

October 9, 1990

Justice Souter took no part in the consideration or decision of this petition.